

## Comments regarding the

### Draft Amendment to the Mineral and Petroleum Resources Development Regulations, 28 November 2019

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## A) INTRODUCTION

### ***About the Centre for Applied Legal Studies and its Work on Mining and Environmental Justice***

1. The Centre for Applied Legal Studies (“CALS”) welcomes the opportunity provided by the Department of Mineral Resources and Energy (“the Department”) to make comments on the Draft Amendments to the Mineral and Petroleum Resources Development Regulations, 28 November 2019 (“draft amendments”)
2. CALS’ vision is a socially, economically and politically just society where repositories of power, including the state and the private sector, uphold human rights. CALS practices human rights law and social justice work with a specific focus on five intersecting programmatic areas, namely Basic Services, Business and Human Rights, Environmental Justice, Gender, and the Rule of Law. It does so in a way that makes creative use of the tools of research, advocacy and litigation, adopting an intersectional and gendered understanding of human rights violations.
3. CALS’ Environmental Justice Programme, in particular, works with mining-affected communities in addressing the environmental, social and economic impact of mining. A central focus of our work has been on benefit mechanisms

prescribed in the Mineral and Petroleum Resources Development Act (MPRDA) such as the Mining Charter and, in particular, Social and Labour Plans.<sup>1</sup> We have published a series of research reports on the SLP system and have consistently engaged with the Department on our findings and recommendations.<sup>2</sup> Within our work on Social and Labour Plans, one of the consistent themes has been the great efforts mining-affected communities often have to go to simply to access the plans meant for their benefit and companies' annual reports to the Department.

4. The proposed amendments to the MPRD Regulations, for the first time since regulations under the Act were gazetted in 2004, represents an important opportunity to enhance the regulations, drawing on the lessons learned over the past decade and a half of implementation and responding to changes in the sector. For CALS, the significant changes they propose in relation to SLPs means they are of particular interest to our work. The inclusion of requirements for publishing SLPs, for the first time in proposed regulations, represents a significant step forward. For this reason the specific comments on the proposed Regulation 46A, which deals with publication, are particularly extensive.
5. The proposed amendments also represent a response to the recommendations contained in a report by the South African Human Rights Commission on the socio-economic challenges of mining-affected communities, which included that the Department review the legal framework governing SLPs.<sup>3</sup>

## **B) PROPOSED AMENDMENT OF REGULATION 1 'DEFINITIONS'**

### ***'Interested and affected persons'***

6. The draft amendments expand on the definition of 'interested and affected persons' in the regulations for the purpose of providing greater clarity through providing an open list ('not limited to') of classes of persons namely:
  - 'Host Communities;
  - Landowners (traditional and title deed owners);
  - Traditional Authority;

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<sup>1</sup> Act No. 28 of 2002.

<sup>2</sup> Centre for Applied Legal Studies, The Social and Labour Plan Series – Phase 1: System Design (March 2016); Centre for Applied Legal Studies, The Social and Labour Plan Series – Phase II: Implementation (March 2017); Centre for Applied Legal Studies The Social and Labour Plan Series Phase 3: Alternative Models for Mineral Based Social Benefit (March 2018).

<sup>3</sup> South African Human Rights Commission *Investigative Hearing Report on the Underlying Socio-Economic Challenges of Mining-Affected Communities in South Africa (August 2018)* at 59.

- Land Claimants;
  - Lawful land occupier;
  - Holders of informal rights;
  - The Department of Agriculture, Land Reform and Rural Development;
  - Any other person (including on adjacent and non-adjacent properties) whose socio-economic conditions may be directly affected by the proposed prospecting or mining operation’;
  - The Local Municipality; and
  - The relevant Government, Departments, agencies, and institutions responsible for the various aspects of the environment and for infrastructure which may be affected by the proposed project.’
7. It is an important step forward to include host communities, lawful occupiers, holders of informal land rights and other persons whose socio-economic conditions will be directly affected by the operation. This definition, therefore, encompasses a broad range of impacted groups.
8. We are pleased to see that the list of examples of interested and affected persons is not a closed one, which signals intent towards inclusive engagement. We are also mindful that the scale of the mining sector means there are more categories of interested and affected persons than can be included on a list in regulations. We would suggest, however, that the Department include civil society organisations on the list, given their significant partnership with the types of mining-affected community listed which includes facilitating access to resources and capacitation.

### **‘Labour sending area’**

9. The inclusion of a definition of ‘labour sending areas’ is important in ensuring acknowledgment in regulations of the significant impact of mining on the communities which have historically provided the migrant workforce who built the mining industry under conditions akin to slavery.

### **‘Meaningful consultation’**

10. The draft amendments add a definition of meaningful consultation. This definition is clearly informed by the case law on consultation in the mining licensing process (*Bengwenyama* case in particular) and by the broader Constitutional jurisprudence on democratic participation and meaningful engagement.<sup>4</sup> The

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<sup>4</sup> *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC).

following requirement regarding the information that the applicant must provide to the landowner, lawful occupier, or interested and affected party mirrors that set out in *Bengwenyama*:

‘...about the impact the prospecting or mining activities would have to his right of use of the land by availing all the information pertaining to the proposed activities enabling these parties to make an informed decision regarding the impact of the proposed activities.’<sup>5</sup>

11. The requirement of good faith engagement can be traced to the jurisprudence regarding meaningful engagement in the context of evictions and the right to housing.<sup>6</sup>
12. The explicit inclusion of requirements for the meaningfulness of engagement in South African law into the definition is a step in the right direction; given that good faith and transparency are so frequently absent in mining companies engagements with communities.
13. It must, however, be noted that mining-affected communities are demanding more and are increasingly asserting the right to determine whether and how mining takes place on their land. This is prompted by the environmental, social and economic devastation mining brings to communities with little in the way of discernible broad-based benefit. They are drawing on African Law and on the emerging principle of international and regional human rights law of free prior and consent (FPIC) which is the product of the struggles of indigenous peoples.<sup>7</sup> FPIC is continuous (not a onetime event) and must be free (un-coerced), prior (before any development occurs) and informed (communities must have access to all information necessary to make an informed decision).
14. Communities living on communal land have utilised the Interim Protection of Informal Land Rights Act (IPILRA), which provides that no one may be deprived

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<sup>5</sup> Ibid at para 66.

<sup>6</sup>Key cases include: *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC); and *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC).

<sup>7</sup> See, in particular, Article 32 (2) of The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which provides that ‘States shall consult and co-operate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free prior and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.’

of informal land rights protected under the act without their consent.<sup>8</sup> Critically Section 2(2) of IPILRA provides that deprivation of land rights under African Law can only occur in accordance with the procedures under the law of the communities. In most or all cases, consent of the rights holder is required. In *Maledu* communities succeeded before the Constitutional Court which held that the award of a mining right does not have the effect of divesting someone of their informal right under IPILRA.<sup>9</sup> The most well-known struggle around the of communities to choose their own development path is of the community in Xolobeni, through their organisation the Amadiba Crisis Committee which has resisted a proposed titanium mine project for 15 years. They were victorious in the North Gauteng High Court which developed the law further to hold that in the absence of obtaining consent through the process provided for in IPILRA and African Law, the Minister cannot issue a mining right.<sup>10</sup>

15. That the regulations do not provide for consent shows a serious deficiency in the empowering legislation, the MPRDA in that it is not aligned to IPILRA and the requirement of consent. The amendment of mineral legislation to provide for a process of FPIC is a matter of priority.

## C) THE AMENDMENTS PERTAINING TO PUBLIC PARTICIPATION

### ***Regulation 3 - Notice to interested and affected persons of applications by Regional Manager***

16. The proposed amendments introduce some changes to the initial process of consultation of interested affected persons on the acceptance of the application for a right or permit under the act. This process consists of the Regional Manager notifies interested and affected persons of the application and providing them with a minimum of 30 days to submit comments.
17. First, additional forms of notice by the Regional Manager, namely 'in community halls, municipal offices, or traditional offices in English and one other official language that is dominantly used in the relevant area' are included. This is an important acknowledgment that meaningful notice requires being attentive to the

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<sup>8</sup> Act No. 31 of 1996.

<sup>9</sup> *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 (1) BCLR 53 (CC) at para 106.

<sup>10</sup> *Baleni and Others v Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP) at para 81.

manner in which different interested and affected persons, including the mining-affected community, will likely receive information through a variety of channels.

18. However, the phrasing of each of requirements as alternative 'or' rather than cumulative 'and' means that technically, mere publication in the provincial gazette could be sufficient. This seems to be a loophole that could undercut the progressive intent behind the amendment. We therefore suggest that the 'or' becomes 'and.'
19. Of course, in the circumstances, one method may be impractical or redundant and therefore not necessary for the Regional Manager to follow. To deal with this possibility, while ensuring more than a single form of notice is the norm we would propose adding to the preface, something to the effect of the following:

*'in addition to the notice referred to in sub-regulation (1), the Regional Manager or designated agency, as the case may be, must also make known the application by a combination of the following methods that is likely to reach a wide range of interested and affected persons, taking into consideration the different ways in which different interested and affected persons access information.'*<sup>11</sup>

20. In the alternative, we suggest that the same avenues of notice contained in Regulation 41 of the 2014 Environmental Impact Assessment Regulations under the National Environmental Management Act (NEMA EIA Regulations) should apply. These requirements will be discussed below in relation to the proposed amendments to Regulation 42 of the MPRD Regulations.

### ***Addition of Regulation 3A – Obligation on the part of the applicant to consult***

21. A significant addition in the draft Amendments is Regulation 3A. 3A clarifies which process governs the in-depth consultation of landowners, lawful occupiers and

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<sup>11</sup> CALS' proposed addition is underlined.

interested and affected parties by the applicant for a prospecting rights, mining right or mining permit.

22. The draft amendment provides that the public participation process that pertains to the environmental impact assessment in the mining right application process is the standard process set out in regulations 39-44 of the NEMA EIA Regulations

23. This change is necessary to reflect the 'One Environmental System' in which NEMA governs EIAs in the application process. The MPRDA has always expressly stated that the results of the participation must be included in the environmental reports. Since NEMA now governs these reports, it is correct that the NEMA public participation process should apply. As will be discussed below in relation to Social and Labour Plans (SLPs), the requirements for the notification of interested and affected persons under the NEMA EIA process are robust and sensitive to the local context.

### ***Addition of Regulation 3B - Notification by the right/permit holder before commencing operations***

24. The draft amendments introduce a new procedure for the right holder notifying the landowner or lawful occupier within 21 days of their intention to commence. It is a positive step that it is being regulated.

25. However, the proposed provision does not take account of the need for consent on the part of those with land rights in African Law.

### **D) PART II OF THE DRAFT AMENDMENTS – SOCIAL AND LABOUR PLAN (REGULATIONS 40 TO 46)**

26. The draft amendments make a number of changes of importance with regard to Social and Labour Plans (SLPs). CALS, other civil society organisations and communities have long pointed out that there are a number of gaps in the legal provisions pertaining to SLPs that render it difficult for the beneficiaries of these programmes to meaningfully participate, benefit and hold mining companies to their commitments. The draft amendments, as will be outlined, do, in several respects, address the concerns that have been raised.

### ***Amendment of regulation 41 – Objectives of social and labour plan***

27. We note the amendment of the objective in 41 (c) to include labour sending areas as the intended beneficiaries. This is a progressive development given the

significant social and economic impacts suffered by the communities that have provided mining companies with a migrant labour force.

## ***Amendment of regulation 42 – Submission of social and labour plan***

28. Regulation 42, which sets out the required process for the submission of SLPs by applicants, has been amended in several respects.
29. First there is an insertion in regulation 42 (2) (b) in order to limit the time period applicants have to revise their SLP when the Regional Manager has sent the SLP back with proposed amendments.
30. Of particular importance for communities and civil society partners are the provisions that, for the first time in binding regulations, specify the applicable framework for participation of communities in the development of the content of SLPs.
31. The inserted Regulation 42 (3) requires the applicant to, within 180 days of being notified of the acceptance of the application, consult communities and relevant structures (defined as the relevant municipalities). This is in order that the SLP both addresses the needs of communities and is aligned to the applicable Integrated Development Plans.
32. The inclusion of an express requirement for community participation is a significant step by the department to address a gap that has been highlighted by CALS and by community and civil society partners.<sup>12</sup>
33. The draft amendments go further and in Regulation 42 (3) specify that the public participation process that governs this consultation is that set out in regulations 39 to 44 of the NEMA EIA Regulations, 2014.
34. One of the most positive implications of the above for community participation is that applicants will have to comply with the requirements for the form and content of the notification of interested and affected persons specified in Regulation 41 (2) – (4). Five basic forms of notification of interested and affected persons are provided (some of which have sub-components tailored to different contexts) and, critically, they are cumulative (all must be utilised, with exceptions). Given the

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<sup>12</sup> This gap has been highlighted in all CALS research reports and relevant submissions regarding SLPs. See, for example, Centre for Applied Legal Studies, The Social and Labour Plan Series – Phase 1: System Design at 95-97.



detail of the provision we will not seek to quote them but will paraphrase the 5 basic forms of notice provided for:

- Fixing a notice board on the site of activity and an alternative site;
- Personal notification of parties such as landowners, occupiers (including of adjacent land) and various organs of state;
- Placing the advertisement in government gazettes or local newspapers;
- Publishing advertisements in provincial or national newspapers where the activity might have an impact beyond the municipality; and
- Alternative forms of notice to overcome barriers to participation including but not limited to illiteracy or disability.

35. Another manner in which the applicability of the EIA process to consultation on the SLP benefits participation is a requirement that the written comments, response to comments, and records of meetings is attached to the main document (in this case the SLP).

36. Further reasonable alternative manners of recording comments must be provided for to ensure persons with disadvantages including lack of reading or writing skills or a disability, can access them.

37. One potential challenge, however, is that the provisions with regard to the content of notice in 41 (3) (a) and (b) specify information pertaining to EIAs rather than SLPs. Much of the requirements are applicable to both, for example 'the manner in which the person to whom representatives in respect of the application or proposed application may be made.' There are some gaps, however, such as information on accessing any draft SLPs and the applicable Integrated Development Plan/s (IDP) of local and district municipality/s.<sup>13</sup>

38. Further, there are material differences between the avoidance, management, mitigation and rehabilitation measures in the environmental management programmes (EMPr) that result from the EIA processes and the local economic development (LED) and other developmental projects that are contained in SLPs. These relate to the, *inter alia*, the objectives and deliverables, the expertise

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<sup>13</sup>IDPs are the central legislative mechanism created to give effect to the central role of local government in local economic development as set out in the Constitution of the Republic of South Africa, 1996 (the Constitution). The powers and functions of local government in South Africa are set out in Section 156 of the Constitution of South Africa read with part B of Schedule 4 and part B of Schedule 5. IDPs are regulated by Chapter 5 of the Local Government: Municipal System Act No. 32 of 2000.

required, and the key governmental role players (local and district municipalities will be particularly integral to SLPs).

39. In our research on SLPs, we have found that the text of SLPs seldom indicates how project selection is influenced by the outcomes of a dialogue with communities on their needs, priorities and proposals for projects.<sup>14</sup> Further, the South African Human Rights Commission has found that sometimes companies do not consult communities at all on SLP projects, and that this failure results in projects not in line with the needs and priorities of communities.<sup>15</sup> For SLPs to meaningfully reflect the needs and wishes of communities (and employees), it is vital that the level of consultation be deepened from just a formal exercise to a genuine collaboration between equals.

40. We have suggested that a mechanism for achieving this would be to require that the mining company, communities and employees agree on and sign the SLP before it is ready for submission to the department for approval.<sup>16</sup>

41. We are therefore of the view that while key principles and requirements pertaining to notice and transparency are catered for in the NEMA EIA Regulations, there is still a need to tailor them to a developmental instrument such as SLPs. These instruments require the direct participation of community beneficiaries as well as co-ordination with local government to ensure alignment with IPDs.

### ***Amendment of Regulation 43 – Applicability of social and labour plan***

42. The proposed amendment to regulation 43 is that it is no longer an SLP ‘lodged with the Regional Manager) but ‘an approved’ SLP that is valid until the issuing of a closure certificate in terms of Section 43 of the Act.

43. It is important that there is clarity with regard to which versions of the SLP is applicable and, therefore, legally binding. There is, however, a loophole, which CALS and several community partners have encountered. There are instances in which we have been told by the Regional Office that the particular mining operation has no SLP (neither a current one nor a previous SLP) in spite of evidence that the mine has been operating for several years. One manner in which these draft amendments could address this loophole is through a deeming

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<sup>14</sup> Centre for Applied Legal Studies *The Social and Labour Plan Series Phase 3: Alternative Models for Mineral-Based Social Benefit (March 2018)* at 10.

<sup>15</sup> South African Human Rights Commission (note 2 above) at 62.

<sup>16</sup> Centre for Applied Legal Studies (op cit) at 38-39.

provision that, in the event of no decision or communication from the regional manager within 180 days, the SLP is deemed to have been approved and therefore binding on the applicant. To ensure that this does not result in SLPs coming into force without the knowledge of communities, it is our view that such a deeming provision should only apply in the event that communities and employees have agreed up and signed the SLP, as per our submission above.

44. Another loophole which, in our view, requires clear guidance in the regulations, is the eventuality that mining companies utilise amendment and review processes in order to defer commitments that they have not complied with in the next cycle. This creates an incentive for non-compliance, as companies have an avenue of continually rolling over unmet commitments into successive SLP periods.
45. We would argue for an express provision to the effect that commitments that have not been met during the five years of an iteration of the SLP (e.g. 2016-2020) remain applicable over and above new commitments contained in the next iteration (e.g. 2021-2025).

### ***Amendment of Regulation 44 – Amendment of social and labour plan***

46. Regulation 44 regulates the amendment or variation of SLPs, requiring the consent of the Minister. The amendments largely leave this regulation unchanged with the exception of specifying that this provision only applies to approved SLPs and expressly stating that the process is governed by Section 102 of the Act. This is the section, which requires the written permission of the Minister.
47. This represents a missed opportunity as this means that significant reductions of SLP commitments can potentially occur without community members knowing and providing input. For this reason, CALS has recommended that community participation be a requirement in the process of amending as well as developing an SLP.<sup>17</sup> We therefore suggest that there should be a requirement that mining right holders notify interested and affected parties of proposed amendments to the SLP through, at a minimum, posting notice on their website (or the website of their holding company), direct communication to registered interested and affected parties (through email) and through an announcement on a local radio

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<sup>17</sup>Centre for Applied Legal Studies *The Social and Labour Plan Series Phase 3: Alternative Models for Mineral-Based Social Benefit* at 20.

station. The announcement should indicate which projects have changed and how interested and affected parties can provide input.

48. Public meetings should also be required to consult the beneficiary communities of the amendments. The afore-mentioned announcement should provide the time and venue of the public meeting. If, however, the regulations introduce a requirement for periodic public stakeholder meetings on the progress of the SLP, these meetings would be the appropriate forum for consultation on amendments. These meetings should be advertised through, at a minimum, the above-mentioned forms of notice.

### ***Amendment of Regulation 45 – Reporting of social and labour plan***

49. Regulation 45, which requires that the right holder submit annual reports on their compliance with SLPs is unchanged, save for the clarification that such reports are only to be submitted with respect to approved SLPs.

### ***Amendment of Regulation 46 – Contents of social and labour plan***

50. The only amendment to regulation 46, which sets out the content requirements for SLPs, is to Regulation 46 (b) (v) which deletes the requirement for a plan to achieve the targets of 10% participation of women in mining and 40% Historically Disadvantaged South Africans (HDSA) participation in management. We note with concern the removal of the only binding target in the SLP framework pertaining to the employment of women on the mine.

51. We understand that these targets are out of date. We, however, are of the view that what is required is periodically updated regulations containing transformation targets. The limitation of the Mining Charter is that its legal status is not clear, which also strengthens the hand of mining companies not wishing to comply. We are the view that both an amendment to the MPRDA to empower the Minister to provide regulations with binding transformation targets to be updated every five years, and the development of new regulations to give effect to them.

52. There remains an overarching problem with the content of SLPs that is not addressed in these amendments and this relates to gender inequality, both at the level of the community and the mining operation. We shall address this issue under the heading 'issues not addressed in the amendments' below

### ***Addition of regulation 46A - Publication of an Approved SLP***

53. Regulation 46A represents a notable step forward by placing a clear obligation on mining rights holders to ‘publish the approved Social and Labour Plan in English and one other dominant official language commonly used within the mine community. It also represents an improvement on what is contained in the Mining Charter, through specifying a cumulative set of avenues of publication.
54. The accessibility of SLPs and annual compliance reports in terms of Section 25 (2) (h) to communities has been a longstanding objective of CALS. We have focused on this in response to the frustration we have seen in community partners and clients who have been sent from pillar to post in attempting to access the plans that are meant to benefit them. This has led a community-based organisation to approach the Courts for declaratory relief on the public nature of SLPs and the parameters governing how publication should occur. The Bill goes a very significant way in addressing the relief they are asking for, with the **exception** of an absence of a requirement to publish right’s holders reports on their compliance with the SLP submitted annually in terms of Section 25 (2) (h) of the MPRDA (annual compliance reports).
55. We are of the view that all the avenues set out in regulation 46A that mining rights holder **must** follow, namely company website/s, local newspaper/s, hard copies in local libraries, municipal offices, traditional authority offices, and company and mine offices are very important channels of information for different sections of mine-affected communities and workers.
56. We are also of the view that announcements on ‘...local radio stations and relevant news outlets about the availability and content of the approved Social and Labour Plan’ are a very valuable manner of ensuring the SLP is widely known. Our only suggestion is that the language should change from the permissive ‘may’ to the imperative ‘must’ since there is already a qualifier of ‘where feasible’ which covers the instances where this avenue is not available to mining rights holders. Except where not feasible (e.g. there is no local radio station), the use of local radio stations and news outlets to communicate this information to communities should be a requirement not an option.
57. While acknowledging that 46A represents a step forward of fundamental importance we will also highlight a few areas in which 46A could be strengthened even further.
58. In our view, the **most important** manner in which the Department can strengthen 46A is through requiring the **publication of annual compliance reports** as well

as SLPs. These reports contain crucial information enabling communities to assess the progress of programmes that are intended for their benefit and to engage with mining companies with information at their disposal. We have also seen instances in which the reports provide greater specificity on project deliverables (including location) than the original SLP document. For these reasons, meaningful access to information requires that communities can access both documents. At present CALS is involved as representatives of a community-based organisation in a litigious process to make SLPs and annual compliance reports public.

59. In our experience assisting communities accessing SLPs and annual compliance reports, annual compliance reports have been even more difficult to access than SLPs. As of the time of drafting these comments, CALS is not aware of a single company that has placed a **comprehensive** set of annual compliance reports for each SLP on its website.
60. From our research, advocacy and other work in the sector, we have observed a general tendency (where compliance occurs) to do the minimum to comply with legislation and regulations.<sup>18</sup> We have some reason to anticipate that a significant proportion of mining companies might interpret the lack of an express mention of annual compliance reports as meaning they do not have to publish them. For this reason, we strongly urge that annual compliance reports be included in the publication requirement. Here it should be noted that the Minerals Council South Africa has, recently, established a portal on its website for members to put up their SLPs. Further, it should be noted that the relevant site refers to the compliance reports as well as the SLPs. This portal is, however, strictly voluntary.
61. Second, a single database containing all SLPs and annual compliance reports by mining companies would be the most accessible online platform for communities to access SLPs. This is especially important given the flux in ownership of mines. The Department, as the only body that holds all these documents has the unique ability to publish online all SLPs, which was a recommendation of the South African Human Rights Commission.<sup>19</sup> We would therefore encourage the

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<sup>18</sup> Of course, compliance levels of companies with SLPs have been very low, as the results of the Department's inspections for years 2013/2014, 2014/2015 and 2015/2016 that are contained in a report by the South African Human Rights Commission show. The average level of compliance for the period was 30% of mining companies inspected. South African Human Rights Commission *Investigative Hearing Report on the Underlying Socio-Economic Challenges of Mining-Affected Communities in South Africa* (August 2018) at 77.

<sup>19</sup> South African Human Rights Commission (op cit) at 92.

Department to take the bold step of committing in regulations to the establishment of the database.

62. Third, frequently the mining right holder itself is a different company, albeit a subsidiary wholly or majority owned by medium or large mining companies. To cite one example, Rustenburg Platinum Mines Limited, which is a wholly owned subsidiary of Anglo American Platinum Limited, holds the mining right for Twickenham Mine. Many of the companies that have mining rights do not have a website, unlike their parent companies. We are concerned that some companies will use this as a loophole to circumvent the intent of the regulations. We therefore would rephrase the entity with the obligation to publish as 'a mining right holder and/or its parent companies/s.'

63. Fourth, on the face of it, the obligation is not retrospective and only applies to those SLPs or reviewed SLPs developed after the coming into force of the proposed amendments. We would recommend that the obligation expressly applies to all SLPs of companies past and present.

#### ***Addition of 46B - Review of a Social and Labour Plan***

64. Another important step taken by the Department in the draft amendments is to formalise the existing practice of reviews of SLPs every five years and the development of a new iteration and provide a process.

65. Importantly the regulations require that the review be done in consultation with the following stakeholders: affected mine communities, adjacent communities, labour sending areas and the local or district municipality. What this means is that each five-year iteration of the SLP will be the product of a process that includes direct community input. Also important is that in the review, the Minister must take account of the extent of the mining right holder's compliance with the SLPs.

66. An issue that we would have liked to have seen clarified in 46B is that status of SLP commitments that have not been fulfilled by the end of the 5-year review cycle. We are concerned about a perverse incentive that allows companies to repackage commitments that they have not fulfilled on time in the next SLP, creating a cycle of non-compliance. We propose an express provision to the effect that commitments that are outstanding at the end of the 5 years run in parallel to the new commitments developed through the review. Further, the regulations should only allow amendments of commitments within the 5-year deadline. Any reasons why the project cannot be implemented in full should be clear before the

development of the next SLP, so the opportunity to amend an SLP within the five-year period should provide sufficient flexibility.

67. Regulation 46B would also be strengthened if it were to specify how the listed interested and affected persons must be notified. Notice should again be through the avenues required in the NEMA EIA Regulations.

68. The regulations should also set out the information rights holders must make available to communities and other interested and affected persons. In addition to SLPs and compliance reports, this should include any reports produced during the review process and any proposals by the right holder regarding projects for the next cycle.

### ***Addition of 46 C - Collaboration on Social and Labour Plan***

69. Collaboration of mines in the same area on SLP projects is important to ensure that projects are of a scale and viability to have a meaningful impact. It is a positive development that the proposed amendments seek to encourage this collaboration while retaining departmental oversight by requiring any amendments to be approved through the usual amendment process.

70. It is, however, critical, that there is widespread knowledge of any such changes amongst the communities and workers who are the beneficiaries of the SLP. Expressly providing in the regulations that the same publication requirements set out in the proposed regulation 46A apply to any amendments to SLPs pursuant to the collaboration.

## **E) OTHER SLP ISSUES (NOT ADDRESSED IN THE AMENDMENTS)**

### ***Financial provision***

71. Two vital and closely related gaps in the regulatory framework for SLPs is the absence of a legislated mechanism by which rights holders are required to ring fence the financial provision (budget) for SLPs coupled with the lack of a legislated formula for determining the quantum (size) of this financial provision.

72. The South African Human Rights Commission has recognised the importance of this and the above-referenced report contained the following recommendation:



‘...The amendment review process must include the explicit consideration of the introduction of prescribed and ring-fenced financial contributions by mining companies towards the implementation of SLPs.<sup>20</sup>’

73. In the course of CALS work on SLPs, we have come across instances in which companies significantly reduce SLP commitments in response to downturns in the economy and/or weakened financial position of the company. The most well-known example was when Lonmin significantly reduced its central Social and Labour Plan commitments, including its commitment to build 5500 houses, citing the impact of the 2008 economic crash on its operations as well as its failure to secure the anticipated bank loans. By the end of the SLP cycle, only 3 houses were built. However, regardless of the financial fortunes of the company, the environmental, social and economic impacts of mining are borne by the community. To guard against this, the Department needs to develop a mechanism to ensure that the budget for SLPs is protected against the vicissitudes of commercial performance. This is not without precedent in the mining sector given the framework for the securing and setting aside of the financial provision for environmental rehabilitation.

74. For the majority of the host and adjacent communities, contribution to local economic development is the main benefit they can derive from mining. Further, SLP projects need to be significant in scale in order to make any inroad in addressing the social and economic needs of communities and workers. We therefore propose that mining right holders be required to contribute a substantial proportion of their projected annual turnover towards SLPs, as much as 5%. We would favour using a formula based on turnover rather than profits, as there is more scope for companies to under-project profits. We would also suggest considering a system akin to progressive taxation, in which larger operations in terms of projected turnover are required to contribute a higher percentage of turnover to SLPs.

## **Gender**

75. The existing regulations pertaining to SLPs provide minimal specific requirements for measures to address structural gender inequality and gender-based violence in the community and at the mine site. This is a serious oversight in regulations designed to for the purpose of transformation, which is a project of dismantling all

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<sup>20</sup> South African Human Rights Commission (op cit) at 91.

structural inequalities and achieve an egalitarian society.<sup>21</sup> The failure of these draft regulations to address the gap comes as a particular disappointment given that one of the recommendations by the South African Human Rights Commission is to, in the course of reviewing the SLP legal framework, assess 'the present regulatory framework for SLPs against the criterion of gender-responsiveness.'<sup>22</sup>

76. Local economic development (LED) projects should be required to include projects designed to advance economic equality of women, youth and persons living with disability. To achieve this the SLP participation process must expressly include consultations with women, youth and persons living with disability in mining-affected communities on their main socio-economic challenges (especially those associated with the impact of mining) and on projects to address them. What will be required, whether the allocation of sufficient land for agricultural activities disrupted by mining, clinics or other project, can only be identified through meaningful engagement of the intended beneficiaries.

77. Moreover, mining companies should be required to put in place measures to ensure that the barriers to women in the mining industry are addressed. These include requirements for separate changing rooms, equipment and clothing tailored to women, victim-centred processes to deal with gender-based violence on the mine site, and day care facilities for children. These requirements should form part of SLPs.

### ***Capacitation of communities***

78. To ensure that engagement on the contents of SLPs (and all other processes including environmental impact assessments) is meaningful and between equals, it is vital that communities are provided with resources to bring their chosen specialists in relevant fields to engagements, just as mining companies do. In relation to SLPs, these fields would include local economic development and project planning. More consolidated measures towards capacitation of communities has been a persistent demand of the organised mining-affected community sector, as is reflected in the Peoples' Mining Charter.<sup>23</sup> Civil society organisations have been proposing for some time a capacity-building fund to

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<sup>21</sup> C Albertyn & B Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality (1998) 14 (2) SAJHR 248-267 at 249.

<sup>22</sup> South African Human Rights Commission Investigative Hearing Report on the Underlying Socio-Economic Challenges of Mining-Affected Communities in South Africa (August 2018) at 59.

<sup>23</sup> Adopted on 26 June 2016 in Berea.

which mining rights holders, amongst others would contribute.<sup>24</sup> We are of the view that the Department can lead the way in establishing a regulated framework for a central capacity-building fund, to which applicants for rights under the Act will be required to contribute. Communities would be able to approach scientists, economists, lawyers and other specialists and the fund would reimburse them for their work.

## F) CONCLUSION

79. Thank you for providing the opportunity to provide input. For queries and further information, please contact Robert Krause (Researcher) at [Robert.Krause@wits.ac.za](mailto:Robert.Krause@wits.ac.za) or 011 717 8615. CALS welcomes any opportunity for further engagement on these draft amendments.

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<sup>24</sup> Centre for Applied Legal Studies *The Social and Labour Plan Series Phase 3: Alternative Models for Mineral Based Social Benefit* (March 2018) at 19; Bench Marks Foundation Independent Problem Solving Service Executive Summary (10 August 2017).